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No. 943

IN THE

SUPREME COURT OF THE UNITED STATES

CONTINENTAL BAKING COMPANY,
Petitioner

vs.

JESSE BUMPUS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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TOOP

TABLE OF CONTENTS.

	Page
QUESTIONS PRESENTED	2
STATEMENT	3
REASONS FOR GRANTING THIS PETITION	7
BRIEF	11
ARGUMENT	14
CERTIFICATES OF SERVICE	24

TABLE OF CASES.

Allen v. Moe (U. S. D. C., D. Idaho) 9-11

Fair Labor Standards Act, 29 U. S. C. A.:

Section 202 11

Section 206 5-11

Section 207 6-11

Section 218 6-13

Fleming v. Belo Corporation, 121 Fed. (2d) 207 7-9-10-11-19

Fleming v. Stone, 4 Labor Cases, page 62092, par. 60697 8-11-18-20

Gibson's Suits in Chancery, Sec. 955 14

Great Northern Ry. Co. v. Delmar Co., 283 U. S. 686; 51 S. Ct. Rep. 579 12

Gurtov v. Volk, 11 N. Y. Sup. (2d) 604 9-10-11-17

TABLE OF CASES—(Continued).

	Page
Highland v. Railroad, 279 U. S. 253, 261	12-22
Hobbs v. McLean, 117 U. S. 567; 6 S. Ct. Rep. 870	12
Klotz v. Ippolito, 40 Fed. Sup. 422	14
Lynch v. U. S., 292 U. S. 571, 579	12-22
Missell v. Overnight Transportation Co., 40 Fed. Sup. 174	9
Reeves v. Howard County Refining Company, 33 Fed. Sup. 90	8-9-10-11-16-22
Remer v. Czaja, 36 Fed. Sup. 629	13
U. S. Constitution, Amendment 5	12
U. S. V. Darby, 312 U. S. 100	11-23

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Continental Baking Company, prays that writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Sixth Circuit entered on December 10, 1941, reversing with directions the judgment of the District Court of the United States for the Western Division of the Western District of Tennessee rendered April 29, 1941 (motion for new trial overruled June 2, 1941).

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed December 10, 1941, and is not yet

reported in the printed volume of the Federal Reporter, but printed copies of said opinion are attached to the record filed with this petition.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, being Title 28, U.S.C.A., Section 347.

Application for a stay of the mandate pending application to this Court for a writ of certiorari was made on the 8th day of January, 1942, and order staying said mandate pending this application for writ of certiorari in this Court was entered on the 13th day of January, 1942.

QUESTIONS PRESENTED.

The fundamental questions presented by this petition are:

1. Where a written contract, entered into before the effective date of the Fair Labor Standards Act (52 Stat. 1060; 29 U.S.C.A. 201-219), stipulates that the employee shall furnish 48 hours' work for a fixed weekly pay of $25.00, and the employee continued to work from week to week without change of terms or conditions, is his contract of employment abrogated and rendered illegal because it does not expressly provide that the first 44 hours' work shall be at fifty cents per hour, and the other four hours' work shall be at seventy-five cents per hour, making a total of $25.00.

2. Whether, if the Fair Labor Standards Act is construed so as to render such a contract illegal and so as to require the employer to pay more than the fixed sum of $25.00 for 48 hours' work, the Fair Labor Standards Act is unconstitutional as violating the obligations of a contract.

STATEMENT.

The essential facts upon which this application is based appear in the pleadings, answer to petition for discovery, and stipulation (R. pp. 3, 6, 10, 18). There is no controversy about the fact that when respondent Bumpus was employed, he signed a written employment contract by which it was agreed that he was to furnish 48 hours' work for a salary of $25.00 per week.

Bumpus signed a written employee's card record, the pertinent parts of which are as follows:

> "Full Name—Jesse Watkins Bumpus
> Address—3276 Macon Road, Memphis
> Record of Rate Changes—48 hours—Rate $25.00 per week
> Date—1/19/38
> Appd. By RM
> • • •
> Signed—Jesse W. Bumpus"
>
> Stipulation, Exhibit B, Record p. 18

Mr. R. N. Laughlin, local manager of petitioner, testified:

> "Q. Now what was your employment with regard to Bumpus; was that in accordance with the signed contract entered into?
>
> "A. Yes.
>
> "Q. Was that changed on the effective date of the Wage and Hour Law in any way?
>
> "A. No. There was no change made.

"Q. Prior to that time, you had him, according to your contract, on a salary of $25.00 a week for a basic week of 48 hours.

"A. That is right.

* * *

"Q. Now Mr. Laughlin, did that same basis of pay, $25.00 for a normal week of 48 hours, continue after the Wage and Hour Law went into effect?

"A. Yes, sir."

R. pp. 35, 36

Thus it appears that the original contract was that Bumpus would work 48 hours for a gross salary of $25.00 per week and that he continued to work from week to week under the same terms and conditions; that no change was made in the terms and conditions of his employment upon the effective date of the Wage and Hour Law; and it was not until after Bumpus had severed his connection with the petitioner that any contention was made that $25.00 pay for 48 hours' work was not full and complete compensation for both normal time and over-time under the above mentioned contract.

The Trial Court found that since Bumpus' contract was to furnish 48 hours' work for a weekly salary of $25.00, his contract was a lawful one under the Wage and Hour Law because the hourly rate of pay under this contract was twice the statutory minimum, and under no circumstances could it be violative of the statutory minimum rate of pay. The Trial Court further found that Bumpus had been fully paid in accordance with the Wage and Hour Law. This was a proper ruling sustained by the fact that when the Wage and Hour Law is properly applied to the contract under which Bumpus was

working, he had been paid for all time in excess of the maximum normal work week at one and one-half times the rate at which he had been employed.

The Circuit Court of Appeals for the Sixth Circuit held that Bumpus' hourly rate of pay must be figured by dividing 48 hours into $25.00 regardless of the contract, and held that the petitioner must pay Bumpus $26.04 for 48 hours' work, although the actual written contract between the parties provided that petitioner was to pay only $25.00 for 48 hours' work. The Court of Appeals therefore nullified and voided the written contract under which Bumpus was employed, in spite of the fact that the contract itself provides a pay entirely consistent with the Wage and Hour Law and twice the minimum fixed thereby. This cause was remanded for further proceedings consistent with the ruling of the Court of Appeals.

It is the contention of petitioner that, regardless of any errors which may have been made in the preliminary determination by its counsel as to the applicability of the Wage and Hour Law, and regardless of any errors that may have been made in figuring the amount due the respondent for time in excess of 48 hours or deductions made for time less than 48 hours, when these payments are questioned by the respondent and an accounting is called for, the accounting must be made upon the basis of the written contract of employment.

The portions of the Wage and Hour Law involved are as follows:

"Sec. 206. Minium wages; effective date

(a) every employer shall pay to each of his employees who is engaged in commerce or in the pro-

duction of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour, * * *''

''Sec. 207. Maximum hours

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed''.

''Sec. 218. Relation to other laws

* * * No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter * * *''

REASONS FOR GRANTING THIS PETITION.

The Circuit Court of Appeals for the Sixth Circuit has decided an important question of Federal Law which has not been and which should be settled by this Court.

Nowhere in the Wage and Hour Law is there any indication that the law requires an employer to increase the pay of his employee if that pay is in excess of the minimum provided by the Act. The construction placed upon the Act by the Circuit Court of Appeals for the Sixth Circuit requires the petitioner to increase respondent's pay above that set out in the written agreement between the parties, although that written agreement provides a pay of fifty cents an hour for the first 44 hours, and time and one-half for the additional 4 hours overtime. The fact that the reduction of the regular hours of work to 44, 42 and 40 might reduce the hourly rate does not violate Section 218 of the Act, which provides only that the employer should not use the Act as a means for reducing the **wage paid** the employee. It does not provide that the hourly rate may not be reduced if the weekly wage remains the same.

This petition should be granted for the reason that there are now in existence in the various Districts and Circuits, conflicting opinions regarding the proper interpretation of the questions here presented, or similar questions.

In the case of **Fleming v. Belo Corporation** (Fifth Circuit), 121 Fed. (2d) 207, now before this Court on certiorari, the Fifth Circuit Court of Appeals reached a conclusion inconsistent with that reached by the Sixth Circuit Court in the present case. In the Sixth Circuit's

opinion in the present case, here sought to be reviewed, the Court definitely states that insofar as the Belo case reaches a different conclusion from that reached by the Sixth Circuit, the Sixth Circuit is unable to agree with the Fifth.

In the case of **Reeves v. Howard County Refining Company,** (Fifth Circuit), 33 Fed. Supplement 90, under facts so closely similar to those in the present case that logical distinction is not possible, the District Court for the Northern District of Texas reached a conclusion directly opposite to that reached by the Sixth Circuit Court of Appeals in the present case. The Court there held that a monthly salary which provided regular pay in excess of the minimum wage provided by the Wage and Hour Law and one and one-half times that amount for all overtime, was a legal contract not violative of the Wage and Hour Law.

In **Fleming, Administrator v. Stone** (Seventh Circuit) 4 Labor Cases, page 62092, paragraph 60697, the District Court for the Northern District of Illinois reached a conclusion directly contrary to that reached by the Sixth Circuit in the present case, and held that where the employer and the employee entered into an agreement before the effective date of the Wage and Hour Law, by which the employer was to pay the employee a fixed weekly salary to cover normal time and all overtime, and where such fixed weekly salary afforded pay in excess of the minimum requirements of the Act, such contract was lawful and not violative of any provisions of the Wage and Hour Law.

In the case of **A. E. Allen v. E. C. Moe** (Ninth Circuit), the U. S. District Court for the District of Idaho reached a conclusion contrary to that reached by the Sixth Circuit in the present case, holding that the Wage and Hour Law does not prohibit parties from contracting with reference to labor for a fixed monthly pay, provided compensation to be paid is not less than the minimum and within the scale fixed by the Act.

In **Missel v. Overnight M. T. Co.** (Fourth Circuit), 40 Fed. Sup. 174, the District Court for the District of Maryland reached a conclusion contrary to that reached by the Sixth Circuit in the present case, but this decision has been reversed by the Fourth Circuit Court of Appeals (Not Reported). The Missel case involved a fixed weekly pay for a varying number of hours and not, as here, a **fixed weekly pay** for a **fixed number of hours.**

Numerous State cases have followed the line of reasoning set forth in **Fleming v. Belo Corporation** and **Reeves v. Howard County Refining Company,** and have reached conclusions inconsistent with that expressed by the Sixth Circuit in the present case. Notable among such cases is **Gurtov v. Volk,** 11 N. Y. Sup. (2d) 604, where the contract was to work 48½ hours for a gross weekly pay of $15.00.

Other cases in other Districts are inconsistent with the result reached by the Sixth Circuit; and still other cases, many of which were cited by the Sixth Circuit, are consistent with the ruling of the Sixth Circuit. Under these circumstances, this Court should set at rest the unsettled condition of the Wage and Hour Law. As stated above, this Court now has before it the case of **Fleming v. Belo,** supra, which involves a similar question; but the de-

termination of the Belo case does not necessarily determine the specific question here desired to be presented to the Court.

None of the above cases, with the exception of **Reeves v. Howard County Refining Co.** and **Gurtov v. Volk,** seem to rest upon the ground here presented, viz., that when a contract provides an all inclusive **fixed** weekly pay for **a fixed number of hours,** the "rate at which employed" must be that which requires the employee to work the fixed number of hours for the fixed pay; and time and one-half for overtime must be calculated on that rate, not on the minimum rate, nor upon a rate which would require the employer to pay in excess of the contract price for the hours contracted to be worked. However, in **Fleming v. Belo,** as in the present case, the contract of employment furnishes the contractual basis for figuring the hourly rate and time and one-half.

Here, under the contract and the Wage and Hour Law (for the first year), Bumpus' rate was fifty cents an hour, or 48 hours for $25.00 (44 hours @ 50 cents, plus 4 hours @ 75 cents, equals $25.00). Petitioner contends that all overtime should be figured at this rate of fifty cents (not the minimum of 25 cents), but that not more than $25.00 should be awarded for 48 hours' work.

WHEREFORE, your petitioner respectfully submits that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

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BRIEF.

I.

The purpose and policy of the Wage and Hour Law, as expressly declared by Congress, is to eliminate in industries engaged in commerce or in the production of goods for commerce, the employent of labor at a wage below the minimum standard of living necessary for health, efficiency and general well-being of workers. (Section 2 of the Act.)

29 U. S. C. A., Sec. 202.

U. S. v. Darby, 312 U. S. 100.

This minimum standard is fixed by the Act as 25c for the first 44 hours for the first year, and 30c an hour for the first 42 hours for the second year, with provision for time and one-half pay for overtime.

29 U. S. C. A., Sections 206 and 207.

II.

A contract which provides for a gross weekly or monthly salary in excess of the provisions of Sections 6 and 7 of the Wage and Hour Law, is not violative thereof, and is a lawful, enforceable contract, fully compensating the employee.

Reeves v. Howard County, 33 Fed. Sup. 90.

Gurtov v. Volk, 11 N. Y. Sup. (2d) 604.

Fleming v. Belo Corp., 121 Fed. (2d) 207.

Fleming v. Stone (U. S. D. S., N. D., Ill.)
4 Labor cases, pages 62,095. par. 60,697.

Allen v. Moe (U. S. D. C., Idaho)
4 Labor cases, pages 61,795, par. 60,607.

III.

Where a contract is open to two constructions, by one of which it would be lawful and the other unlawful, the former construction should be adopted.

Hobbs v. McLean, 117 U. S. 567; 6 S. Ct. Rep. 870.
Great Northern Ry Co. v. Delmar Co., 283 U. S. 686; 51 Sup. Ct. Rep. 579.

IV.

A contract providing for the payment of $25.00 as a gross weekly pay for 48 hours' work, must be construed in accordance with its terms, and since lawful and in excess of the minimum wage requirements of the Wage and Hour Law, such contract cannot be constitutionally varied or impaired.

United States Constitution, Amendment 5.
Highland v. Railroad, 279 U. S. 253, 261.
Lynch v. U. S., 292 U. S. 571, 579.

V.

Where parties enter into a contract for a fixed weekly compensation, for a week of a fixed number of hours, such contract should be construed so as to make the parties fulfill their respective obligations. In applying the Wage and Hour Law to the present contract to pay $25.00 gross weekly wage for 48 hours' work, and in reducing such contract to an hourly rate of pay, the rate must be fixed on the basis of requiring the employee to work 48 hours in order to earn a gross salary of $25.00, and as requiring the employer to pay $25.00 for a complete week of 48 hours. Such is the contract of the

parties, regardless of hourly rate. By this process, we obtain the following figures:

For the first year:

44 hours	@ $0.50	$22.00
4 hours	@ $0.75	3.00
48 hours		$25.00

For the second year:

42 hours	@ $0.4902	$20.59
6 hours	@ $0.735	4.41
48 hours		$25.00

The third year is not involved in this litigation.

VI.

The foregoing interpretation of the contract of the parties is not in violation of the provisions of the Wage and Hour Law. Insofar as Section 18 of the Act is of any effect, it provides only:

> "No provision in the Chapter shall justify any employer in reducing a wage paid by him * * *"

The foregoing method of calculation does not reduce the wage of $25.00 for a week of 48 hours.

U. S. C. A., Sec. 218.

Remer v. Czaja, 36 Fed. Sup. 629.

VII.

This suit is to open a settled account. Where the Court orders a settled account opened, as here, a general accounting will be had and the account complained of

wholly set aside and each side required to prove the charges and credits for which he contends. The Court will off-set amounts due from plaintiff against amounts due from defendant, and will correct mistakes made in former accounting.

Gibson's Suits in (Tenn.) Chancery, Sec. 955.
Klotz v. Ippolito, 40 Fed. Sup. 422.

ARGUMENT.

The purposes of the Wage and Hour Law are expressed by Congress in the second section of the Act, where Congress declares the policy of this legislation. That policy is expressly declared to be to prevent industries engaged in interstate commerce or in producing goods for interstate commerce, employing labor at a wage below the minimum standard of living necessary for health, efficiency and general welfare. It follows as a matter of statutory construction that the language used in the statute should be construed to carry out such policy. From this it follows that a contract of employment which pays to an employee less than the minimum set by the Act is an unlawful contract, but it does not thereby follow that where an employee is paid twice the minimum required by the Act the contract of employment is rendered void. The contract in this case falls in the second class. At the time the Wage and Hour Law became effective, requiring 25c minimum wage, the plaintiff, under an express written signed contract was being paid 50c per hour. The plaintiff was satisfied with this rate of pay, and accepted it without question, and it was only after years had passed and his employment had been terminated that he conceived the idea of this suit.

This is not a contract in which a man is employed on a regular hourly basis, nor is it a case in which the employee was employed at a weekly salary without any understanding as to the number of hours which he was to work. Here the plaintiff was employed to produce forty-eight hours' work for the definite fixed sum of $25.00. Whatever the status of the law, if forty-eight hours' work can be produced for a gross pay of $25.00 without violating the provisions of the Wage and Hour Law, then that contract must be construed so as to sustain its legality. The policy of the law is to sustain every contract between citizens unless such contract violates some public policy as declared by the legislative branch of the Government or some law. The present contract violates neither, is a liberal and fair contract, and should be construed so as to sustain its legality and to accomplish its purposes.

It is our purpose in the argument following to show that this contract, properly construed, has been fully complied with and that the plaintiff has been fully paid on either one of two theories. First, that a contract which provides pay in excess of that required by Sections 6 and 7 of the Wage and Hour Law is valid and enforceable, regardless of the time and one-half provision, and, second, if time and one-half is required for all time over the maximum hour week, such time and one-half must be figured in accordance with the actual contract of the parties, and, so figured, the plaintiff has been fully paid.

Under the first contention, we wish to call the Court's attention to some of the numerous authorities of highly persuasive value to this Court.

In the case of **Reeves v. Howard County Refining Company**, 33 F. Sup. 90, the situation as to the plaintiff Owens was strikingly similar to the facts of the present case. Owens was employed before the Wage and Hour Law at a salary of $110.00 per month. After the Wage and Hour Law became effective, he was advised that his hours would be ten hours per day, and that he would receive the same salary of $110.00 per month. Owens continued his employment under this agreement. Thus, Owens was paid a fixed gross salary for seventy-five hours per week. When this contract is construed in accordance with the Wage and Hour Law, it provided a wage which was in excess of the minimum requirements of the law. The Court then held that the contract was legal, valid and binding, and that the plaintiff was not entitled to recover any additional sum, using the following language:

> "The Court is, therefore, of the opinion and finds that under his contract of employment the claimant Owens fully understood and agreed to the new schedule of hours and rate of pay, and that with full understanding as to how he was being paid, he accepted his checks and that there was a valid and binding contract on the basis of hours and rates of pay after October 24, 1938, and that he would not be entitled to recover anything on that basis. We think that if it be construed that he was working on the basis of $110 per month, 10 hours per day, seven days per week, that he was fully paid all he is entitled to under such contract.
>
> "The right to contract is not only sacred in law, but is indispensable to commerce, and its use appeals alike to both employer and employee.

"By the laws of Texas, 10% is made the maximum rate of interest for the use of money. Vernon's Ann. Civ. St. Tex., art. 5071. Under the act of Congress now before us, 25c per hour is made the minimum wage. 29 U. S. C. A., Sec. 206. Parties may contract as before, but employers of labor must not pay less than 25c per hour, and the lender of money must not charge more than 10% for its use.

"In this case each of the plaintiffs entered into a contract with his employer. Insofar as these contracts did not violate the wage and hour law, they are valid and binding upon both parties."

At p. 92.

The foregoing is exactly similar to the present case, where at the time the Wage and Hour Law became effective the plaintiff continued to work a fixed number of hours in excess of the maximum week provided by the Wage and Hour Law, for a fixed sum of money. But, this sum is greatly in excess of the minimum requirements of the Wage and Hour Law.

Another case, which is closest in fact to the one here before the Court, is that of **Gurtov v. Volk**, 170 Misc. 322, and 11 N. Y. S. (2) 604. In this case the plaintiff was employed at $15.00 a week before the effective date of the Wage and Hour Law, and his employment continued at the same rate after the Wage and Hour Law. For the hours worked $15.00 a week was more than 25c an hour for forty-four hours, and 37½c per hour for overtime. The Court, in dismissing the plaintiff's contention, that he was entitled to additional compensation, says:

"The evidence shows that plaintiff worked 48½ hours per week at a weekly wage of $15.00. This ac-

tion is brought under the Fair Labor Standards Act for overtime figured at time and one-half for six hours per week for the six weeks intervening between October 24 and December 3, 1938.

"It seems plain upon the facts of this case that the weekly compensation paid plaintiff pursuant to the agreement between them violates no provision or purpose of the act in question. It is the method of computing and not the amount of the weekly compensation paid to and accepted by the plaintiff without protest to which exception appears to be taken.

"It is not reasonable to view the provisions of the act under discussion as a penalty against employers who, in apparent good faith, have paid wages in excess of the amount prescribed by the act. Such employer appears to be exempt from the operation of the statute."

Gurtov v. Volk, 1 Labor Cases, 998, at p. 999.

One of the leading cases dealing with the right of employer and employee to contract, and holding that their contracts are legal and binding upon the courts if not violative of the express provisions of the Wage and Hour Act, is **Fleming v. Belo Corpn.**, 121 F. (2d) 207.

In the Belo case the employer agreed to pay the employees $45.00 per week. It was agreed that the hourly basis of pay was 75c, and that the employees would be paid time and one-half for overtime over the maximum hours fixed by the Act, and in any event would be paid $45.00 per week. The employees contended that the only way to ascertain the regular rate of pay was to di-

vide the number of hours actually worked per week into the total pay. The Court, in disposing of this matter, says:

> "In cases where there is no express agreement as to the regular rate at which the employee is employed, but only an agreement for a weekly wage, appellant's method of arriving at the regular rate by assuming that the wage stipulated for is not intended to cover overtime worked, would, we think, be unexceptionable. But in cases where, as here, the contract of employment fixes the regular rate, that method will not do, for here within the very words of the statute, 'the regular rate at which he is employed', is fixed as to each employee in his contract of employment."
>
> Fleming v. Belo Corpn., 121 F. (2) 207, at p. 211.

The Court then continues and holds that where the contract is for **an all inclusive salary** in excess of the minimum requirements of the law, the contract will be sustained because:

> "Nothing in it (the Act) purports to or does at all impair the right of employer and employee to contract as they have done here. When we turn to the legislative history of the act, appellant stands no better. For there is no reference in the whole legislative history to prohibiting agreements between employer and employee, as here, **for all inclusive and regular weekly salaries**, none whatever to the effect that it was intended that persons already paying more than the minimum wage the act provided, should be compelled to pay still more. The legislative history of the act, while showing as the legislative history of all new and controversial acts does some individual dif-

ferences of opinion, adds up to showing, as to the over-time provisions, only what the act shows, that in broad outline the Congress intended that for over-time work, time and a half, the regular rate of pay at which each was employed, should be paid each employee. How that regular rate should be arrived at, when it was fixed above the minimum, was not, for all that appears in the briefs of the parties, and we have not otherwise had access to the debates or committee reports, dealt with in the debates on the bill, either in the original passage of it, or in amendments offered to it, except to say that wages above the minimum must be left to bargaining between employee and employer."

At page 212.

The Court further remarks:

"Whether Congress could constitutionally fix a minimum wage and then compel employers wishing to provide for fixed weekly salaries to pay a wage higher than the minimum so fixed, might raise a serious constitutional question."

Another recent case supporting the same theory is that of **Fleming, Admr., v. Stone, et al**, U. S. Dist. Ct. for the Northern District of Illinois, Eastern Division, decided October 6, 1941, Sullivan, District Judge. 4 Labor Cases, page 62092, paragraph 60697.

In this case, the parties agreed upon a fixed weekly salary to cover regular and overtime hours. While the number of hours actually worked fluctuated, the weekly pay when reduced to an hourly basis by figuring regular time for the maximum regular work week, afforded pay

in excess of the minimum requirements of the Act. The Court, in deciding that the contracts were valid and enforceable, says:

> "I am of the opinion that defendants and their employees entered into agreements which were intended to and did fix the weekly rates of employment, covering regular time and overtime. **To be sure these agreements were made previous to the passage of the Act,** but if, before the passage of this Act, defendants and their employees agreed that the weekly salaries **for fluctuating hours** should cover any overtime which they might work in any given week, I can find nothing in the Act, which prohibits the continuance of such contracts after the passage of the Act, provided the minimum wage conditions of the Act are complied with. There is no charge in the present complaint that the minimum wage provisions of the Act are not complied with.
>
> • • •
>
> "It is my opinion that defendants and their employees in this case had a legal right to and did make the agreements or contracts they claim to have made. I believe defendants agreed to pay their employees fixed weekly salaries which were sufficient to cover the regular time and any weekly overtime they might be called upon to work."

Applying the construction of the Wage and Hour Law in accordance with the above decision of Judge Sullivan, in the present case the plaintiff and defendant agreed upon a regular weekly pay which was to be the gross pay to be received by the plaintiff for regular time and any weekly overtime which the plaintiff might be called

upon to work **up to and including 48 hours.** For overtime in excess of 48 hours the plaintiff was to be paid time and one-half. The payments thus made to the plaintiff were in excess of any requirements of the Wage and Hour Law and provided amounts greatly in excess of time and one-half the minimum wage for overtime.

As remarked in the various cases cited above, the relationship of employer and employee is essentially one of contract, and the right to contract is not only expressly recognized by the Act, but must, under the Constitution, be respected. A contract is a property right protected by the Fifth Amendment to the Constitution. As stated in the case of **Reeves v. Howard County Refining Company,** supra, where contracts were entered into between employer and employee, "insofar as these contracts would not violate the Wage and Hour Law, they are valid and binding upon both parties."

The Supreme Court has universally sustained contracts not definitely violative of public policy or provisions of the law. General statements are:

> "Generally speaking, the right to enter into and carry out contracts in respect to one's property and private affairs is protected by the due process clause of the 5th and 14th Amendments."
>
> Highland v. Russell Car & Snow Plow Co., 279 U. S. 253, 261.

> "Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States."
>
> Lynch v. U. S., 292 U. S. 571, 579.

There is nothing in **U. S. v. Darby**, supra, to the contrary. Every contract of employment, in accordance with the provisions of the Act, is valid, whether entered into prior to or subsequent to the enactment of the Law. It follows, therefore, that the contract between the parties to this suit, whereby plaintiff agreed to work 48 hours for $25.00, and the defendant agreed to pay a gross amount of $25.00 weekly for 48 hours' work, is enforceable and is just as valid as if the plaintiff and defendant had agreed prior to or after the Wage and Hour Law to work at a fixed hourly rate for 44 hours, with time and a half for overtime. The contract furnishes the material from which the hourly rate can be calculated. Being a lawful rate, this contractual rate should be enforced.

Since the hourly rate found from the contract is not violative of the Wage and Hour Law, it is immaterial whether the contract be considered as one entered into before the Wage and Hour Law and continued thereafter, or as a week to week contract which was renewed weekly under the same terms and conditions. Where, from the contract the lawful hourly rate, as agreed upon between employer and employee, can be ascertained, that is "the regular rate at which he is employed", and no other rate can be the rate at which he is employed, because the rate is a matter of contract.

Respectfully submitted,

A. L. HEISKELL,
Memphis, Tennessee.

GEORGE FAUNCE, JR.,
New York City,
J. H. SHEPHERD,
W. L. OWEN,
Memphis, Tennessee,
Of Counsel.

TO W. G. CAVETT, Attorney for JESSE BUMPUS,

Columbian Mutual Tower,
Memphis, Tennessee.

You are hereby notified that on the ..... day of ....., 1942, the petitioner, Continental Baking Company, filed in the Supreme Court of the United States a petition for review on writ of certiorari of the decision of the Circuit Court of Appeals for the Sixth Circuit, in the case in that Court in which petitioner is appellee and respondent is appellant, being cause No. 9017 of the docket of said Court.

Copy of said petition, of the printed record in said cause, and of the brief in support of said petition, are annexed hereto and are herewith served upon you.

Dated this the ..... day of ....., 1942.

A. L. HEISKELL,
Attorney for Petitioner.

Service of the foregoing notice, and copy of the petition, brief and record therein specified, is hereby acknowledged.

.....
Attorney for Respondent.

Notice of the filing of the foregoing petition given to the Wage and Hour Administrator by mailing copies of said petition to Warner W. Gardner, Solicitor of Labor, and George B. Searls, of counsel, Washington, D.C.

A. L. HEISKELL,
Attorney for Petitioner.

FILED
FEB 26 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 943.

CONTINENTAL BAKING COMPANY,
PETITIONER,

VS.

JESSE BUMPUS, RESPONDENT.

REPLY

To the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, and on the Merits.

WILLIAM G. CAVETT,
Columbian Mutual Tower,
Memphis, Tennessee,
Attorney for Respondent.

INDEX

Uncontradicted Determinative Facts 1

Determinative Parts of the Fair Labor Standards Act of 1938 Involved in This Lawsuit 2

Decisions of the Lower Courts 3

Questions Presented in This Case 3

These Propositions of Law Have Been Settled for 132 Years 4

Construction of the Fair Labor Standards Act of 1938 6

No Sound Reason Is Given Why Certiorari Should Be Granted in This Case 8

Table of Cases

Addyston Pipe & Steel Co. vs. U. S., 175 U. S. 211, 229, 230 5

Atkinson vs. Ritchie, 10 East 530, 534 (KB) 4

Belo Case, 121 F. 2d 207 8

Bunting vs. Oregon, 243 U. S. 426 7

Gilliam vs. Philadelphia, 70 U. S. 713, 18 L. Ed. 96, 99 c & f Re Debs, 158 U. S. 565, 593 6

Klotz vs. Ippolito, 40 Fed. Supp. 422 8

Legal Tender Cases, 12 Wall. 550, 551 4

L. & N. R. R. Co. vs. Motley, 219 U. S. 467 4

Missel Case, 40 Fed. Supp. 174 8

Norman vs. B. & M. R. R. Co., 294 U. S. 307, 309 5

Second Employers Liability Cases, 223 U. S. 1, 52 5

Super-Cold S. W. Co. vs. McBride (not yet reported) 8

United States vs. Darby, 312 U. S. 100 ..... 5, 9

United States vs. Hutcheson, 312 U. S. 219, 235 7

STATUTES

The Fair Labor Standards Act of 1938 ..... 1, 2, 3, 6, 7

CONSTITUTION

U. S. Const., Art. I, Sec. 1, and Sec. 8 4

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REPLY

To the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, and on the Merits.

Uncontradicted Determinative Facts.

The Continental Baking Company employed Jesse Watkins Bumpus on January 19, 1938, at a salary of $25 per week for 48 hours service (R. 18).

Mr. Bumpus worked for the petitioner to October 19, 1940 (R. 14), and from October 24, 1938, to October 19, 1940, the petitioner worked Mr. Bumpus 732 1/2 hours overtime—more per week than the Fair Labor Standards Act, Section 7, permitted, and which 732 1/2 hours over-

time Mr. Bumpus was not compensated at 1-1/2 times the rate at which he was employed as required by the act of Congress (R. 22).

Mr. Bumpus' contract having been made with the Continental Baking Company on January 28, 1938, nearly five months, lacking three days, before the Fair Labor Standards Act of 1938 was passed, which was June 25, 1938, and was nine months before this act went into force and effect, which was October 24, 1938.

Mr. R. M. Laughlin, Manager of the Memphis plant, testified that there had never been another contract made with Mr. Bumpus after the law went into effect, and he answered:

"No, there was no change made" (R. 35).

Mr. Bumpus confirmed this when asked if there was any change ever suggested or made in his employment:

"No, sir; never did" (R. 23).

Determinative Parts of the Fair Labor Standards Act of 1938 Involved in This Lawsuit.

"Section 7 (a). No employer shall, * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce.

(1) for a work week longer than forty-four hours during the first year from the effective date of this section.

(2) for a work week longer than forty-two hours during the second year from such date, * * *

Unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Prohibited Acts.

"Section 15 (a). * * * It shall be unlawful for any person to violate any of the provisions of Section 6 or 7."

Penalties.

"Section 16 (b). Any employer who violates the provisions of Section 6 or Section 7 of this act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

"Section 18. No provision of this act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this act."

Decisions of the Lower Courts.

District Judge Boyd, on the uncontradicted testimony, decided all the question in favor of Mr. Bumpus except the trial judge held in the teeth of the positive and mandatory act of Congress as follows:

"But there is not anything in it, as I see it, and I have in mind principally the sections relied upon by the plaintiff, which would upset this contract between these parties" (R. 67).

A unanimous court of the sixth circuit reversed Judge Boyd's opinion and held for Mr. Bumpus (R. 72-78, incl.).

Questions Presented in This Case.

Petitioner presents what it calls two propositions

(1) whether or not the contract, made five months before the act of Congress was made, and nine months before the Fair Labor Standards Act went into force and effect on October 24, 1938, without change of terms in the contract of employment, was abrogated and rendered illegal,

(2) if and rendered illegal, the act is unconstitutional as violating the obligations of a contract (Brief p. 2).

These Propositions of Law Have Been Settled for 132 Years.

In 1810 in the case of *Atkinson* v. *Ritchie*, 10 East 530, 534 (KB), Chief Justice Lloyd Ellenborough said that the question could not be doubted at that early date, and,

> "That no contract * * * being made consistent with the rules of law at the time, has become illegal in virtue of some subsequent law, would admit of no doubt."

In 1870—72 years ago in *Legal Tender Cases*, 12 Wall. 550, 551, the court, speaking through Mr. Justice Strong, upon the *exercising of a power granted to Congress to regulate money*, said:

> "Contracts must be understood as made in reference to the possible exercise of rightful authority of the government, and no obligation of a contract can extend to defeat of legitimate government authority."

The Constitution of the United States in 1789, Article I, Section 1, said:

> "All legislative power herein granted shall be vested in a Congress."

There are now 33 powers granted to Congress and under Article I, Section 8, it is provided:

> "The Congress shall have power, * * * to regulate commerce * * * among the several states."

In 1910, 32 years ago, in the case of *L. & N. R. R. Co.* v. *Motley*, 219 U. S. 467, in a unanimous opinion by that great jurist, Mr. Justice Harlan, where the act of Congress, June 29, 1906, prohibited the issuance of "railroad passes" and the question was whether or not a contract made by a railroad to furnish to Motley yearly a pass (or 35 years before the act of Congress was enacted) was valid or whether or not the prohibition of the act of Congress must prevail, and the court held that the railroad pass contract must yield to the act of Congress and said:

> "If that principle be not sound, the result would be that individuals and corporations could, by contracts between themselves, in anticipation of legislation, render of no avail the exercise by Congress, to the full extent authorized by the Constitution, of its power to regulate commerce. *No power of Congress can be thus restricted.*"

The same was held in the *Second Employers Liability Cases*, 223 U. S. 1, 52; and in the antitrust laws, *Addyston Pipe & Steel Co.* v. *U. S.*, 175 U. S. 211, 229, 230.

And as late as 1934, in the "gold clause" causes, *Norman* v. *B. & M. R. R. Co.*, 294 U. S. 307, 309, Mr. Chief Justice Hughes, speaking for the court, said:

> "Contracts, however express, cannot fetter the constitutional authority of the Congress.
>
> "Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity.
>
> Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

In *United States* v. *Darby*, 312 U. S. 100, the court said:

> "It is no longer open to question that it is within the legislative power to fix maximum hours."

It is unfortunate that this the highest court of our nation that does such a tremendous amount of important work of the nation is to have its calendar filled with such cases where the fundamental laws have been so thoroughly settled.

Mr. Justice Swayne, in an epoch making decision, beautifully expressed the duty of this court involving this power expressly given to the Constitution of the United States to Congress:

> "Wherever 'commerce among the states' goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights." *Gilliam* v. *Philadelphia*, 70 U. S. 713, 18 L. Ed. 96, 99, c & f. *Re Debs*, 158 U. S. 565, 593."

It was a most unfortunate human error for the trial judge to hold contrary to what has been the law for 132 years. It would have been amazing for the Circuit Court of the Sixth Circuit, we think one of the best in the United States, to have reached any other result than it did in this case reversing the trial court (R. 72-78, incl.).

Construction of the Fair Labor Standards Act of 1938.

Section 7 says:

> "No employer shall * * * employ any of his employees who is engaged in commerce * * * (1) for a work week longer than forty-four hours, (2) For a work week longer than forty-two hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The answer to the discovery made under oath (R. 10, 11, 12, 13) showed that Continental Baking Company worked Mr. Bumpus 732 1/2 hours overtime, more than this mandatory language permitted unless Mr. Bumpus was paid one and one-half times the regular rate at which he was employed, when, as we turn to the contract made five months before the act of Congress and nine months before this act of Congress went into force and effect (R. 21), Mr. Bumpus was employed to work 48 hours per week for $25 salary. Then, as a very simple mathemetical calculation (not requiring the great Alfred Einstein theory of "relativity"), this gives as answer $0.5208 plus per hour as rate "at which he is employed," and 1 1/2 times for overtime would make $0.7612 plus per hour. Mr. Bumpus, when he worked less than statutory maximum hours, was

paid on this basis. The basis set forth on pages 12-13, brief, *is wholly without evidence, to sustain it,* and seems to be only an idea thought up, *after lawsuit was on appeal.*

Section 15 of this Act says:

> "It shall be unlawful for any person * * * to violate any of the provisions of Section 6 *or* Section 7."

Section 16 (b) provides for penalties if either one of Section 6 *or* Section 7 is violated, and provides the additional penalties.

This act of Congress "regulating commerce among the several states" is evidently fashioned after the Oregon state law which was discussed and held in the case of *Bunting* v. *Oregon*, 243 U. S. 426, the law and the penalty valid, and said:

> "The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden, and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character from penalty to permission."

It must not be lost sight of in construing this act that not only does Section 7 of maximum hours stand on its own foundation and forbid the working of an employee overtime unless the employee is paid 1 1/2 times the regular rate at which he is employed, but Section 15 (a) provides that it shall be unlawful to "violate Section 6 *or* Section 7" and the penalty provided in Section 16 (b) is for the violation of the provisions of "Section 6 *or* Section 7" of this act. The disjunctive "or" must not be overlooked or not considered.

In the case of *United States* v. *Hutcheson*, 312 U. S. 219, 235, the court construing an act of Congress said:

> "Such legislation must not be read in a spirit of mutilating narrowness."

The court, further quoting Mr. Justice Holmes, said:

> "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed."

No Sound Reason Is Given Why Certiorari Should Be Granted in This Case.

The court of appeals in the case reached the only sound and logical conclusion that could be reached without doing violence to and destroying the act of Congress which this court had sustained in the Darby case, and the court of appeals' opinion citing and approving six well-reasoned wage and hour reported cases (R. 76) and the only case that seemed to contradict the positive language of Congress was the *Missel Case*, 40 Fed. Supp. 174, and that case has been overruled by the Fourth Circuit Court of Appeals, not yet reported.

The *Belo Case*, 121 F. 2d 207, from the fifth circuit "is distinguished on its facts as is clear" (R. 76).

This case was distinguished in *Klotz* v. *Ippolito*, 40 Fed. Supp. 422. This was cited and followed as correct by the Fifth Circuit Court of Appeals on December 1, 1941, in the case *Super-Cold S. W. Co.* v. *McBride* (not yet reported).

Therefore there *are no federal decisions with the identical and determinative facts identical to the holdings of the Sixth Circuit Court of Appeals in this case; and cases that have not the same facts do not justify or warrant this court to grant a certiorari to review and overrule those cases that have different determinative facts.* If this course were pursued by this court its labors would be unnecessary and too great a burden. Such labors would lead to great confusion and discussion of cases that are not determinative of the facts involved in this case, and invade the "realm of debate, not decision."

We think that the cases relied upon by petitioner have no more application to the facts in Bumpus case than does the Dartmouth College case or the case of *Richard Roe* v. *John Doe*—the facts in those cases cited do not fit the facts in the Bumpus case any more than would the skin of a flea fit the body of a Jumbo elephant.

Therefore, we sincerely urge and insist that a certiorari should not be granted in this case to add to the calendar of this court to review cases not involving the same facts as exist in the Bumpus case.

The question that the Continental Baking Company has presented in this case only one assignment of error on page 2 of its brief, involving the constitutionality of act and validity of the contract, has not only been decided in the *Darby Case*, 212 U. S., but was settled 32 years ago in the Motley case and was thought, there was no doubt about it, 132 years ago by Chief Justice Lord Ellenborough in the Atkinson case in 1810.

While to appear before this, the highest court of the nation, to argue a constitutional question, may swell most lawyers to the point of bursting with pride, the constitutional question in this case has been settled for 71 years in the Legal Tender Cases, and the question was not doubted by the King's Bench of England 132 years ago, it seems an unnecessary burden that this court should grant a certiorari in this case. Therefore to argue these questions again would but bring additional burdens on this court, especially since this court said in the Barby case:

> "Nor is *it any longer open to question* that *it is within the legislative power* to fix maximum hours." 312 U. S. 100.

Respectfully submitted,

WILLIAM G. CAVETT,
Memphis, Tennessee,
Attorney for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 943

CONTINENTAL BAKING COMPANY, PETITIONER

v.

JESSE BUMPUS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Administrator of the Wage and Hour Division of the United States Department of Labor is charged with the responsibility and duty of administering the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C., sec. 201, et seq., hereinafter referred to as the Act). Because this case involves important questions of interpretation of the Act, and of the

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rights and obligations of employers and employees thereunder, the Solicitor General submits this memorandum on behalf of the Administrator, as *amicus curiae,* in order to present the views of the Government concerning the desirability of granting a writ.

The validity of the Administrator's method of computing overtime pay pursuant to Section 7 of the Fair Labor Standards Act of 1938, and the legality of contractual efforts to set the "regular rate" of pay within the meaning of that section, are presented for decision in *Holland, Administrator* v. *A. H. Belo Corporation,* No. 622, certiorari granted October 27, 1941. The question whether Section 7 applies at all where the employee's weekly compensation at least equals the statutory minimum for straight time and time and one-half that minimum for the remaining hours is presented in *Overnight Transportation Company, Inc.* v. *Missel,* No. 939, certiorari granted February 16, 1942, and assigned for argument following No. 622. The present case presents the question, closely related to the foregoing, whether an employment contract entered into prior to the Act and providing for a salary of $25 per week of 48 hours, was automatically adjusted when the Act became effective so as to satisfy the requirements of Section 7 by allocating a portion of the weekly compensation to the hours within the statutory maximum, and the remainder of the compensation to the excess hours

at a rate one and one-half times the presumed rate for hours up to the maximum.[1]

We believe that the decision of the Circuit Court of Appeals is plainly correct in refusing to sanction petitioner's attempt to avoid the requirements of Section 7 by arithmetical manipulation. However, in the interests of a comprehensive disposition of difficult and frequently arising controversies concerning the proper construction of Section 7, it would be helpful to have the Court examine this additional facet of the question involved in the *Belo* and *Overnight Motor Transportation* cases.

In the event that a writ is issued, it is respectfully submitted that the case should be assigned to follow Nos. 622 and 939.

CHARLES FAHY,
Solicitor General.

WARNER W. GARDNER,
Solicitor, Department of Labor.

MARCH 1940.

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[1] When the statutory maximum was reduced from 44 to 42 hours at the end of the first year of the Act's operation, a further automatic adjustment assertedly occurred, with the result that the rate for "straight time" diminished but the proportion between it and the overtime rate remained constant (Pet. 13).

U. S. GOVERNMENT PRINTING OFFICE: 1940